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IN THE

Supreme Court of the United States

NO. 281 OCTOBER TERM, 1937.

ALUMINUM COMPANY OF AMERICA, Appellant,

v.

THE UNITED STATES OF AMERICA.

APPELLANT'S BRIEF.

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ALUMINUM COMPANY OF AMERICA, Appellant,

v.

THE UNITED STATES OF AMERICA.

APPELLANT'S BRIEF.

OPINIONS OF THE COURT BELOW.

The opinion (R. 142) of the District Court of the United States for the Western District of Pennsylvania on the issuance of a preliminary injunction is reported in 19 F. Supp. 374. The opinion (R. 174) of the statutory Expediting District Court of the same district on the final injunction hearing is unreported.

JURISPICTION.

The jurisdictional statement required by paragraph 1 of Rule 12 of this Court has been previously filed, separately printed, and probable jurisdiction noted.

STATEMENT OF THE CASE

The 1937 Injunction.

The Aluminum Company of America has been, in turn, defendant, petitioner, and appellant, and in order to avoid confusion will hereinafter be referred to as Aluminum Company.

This appeal is from a final decree vacating a preliminary injunction and refusing a final injunction to restrain certain law officers of the United States from proceeding, on its behalf, with a suit in equity under the anti-trust laws against the Aluminum Company in the District Court of the United States for the Southern District of New York under the following circumstances:

The United States, by petition in equity (R. 8) filed by Attorney General George W. Wickersham, has secured a consent decree (R. 64) of the District Court of the United States for the Western District of Pennsylvania in this case under date of June 7, 1912, enjoining enumerated existing and prospective violations of the anti-trust laws by the Aluminum Company and its officers, agents and representatives.* That decree, as modified on October 25, 1922 (R. 77), pursuant to a supplemental proceeding brought by the Aluminum Company (R. 73), remains in full force and effect.

On April 23, 1937, the United States filed a second petition in equity (R. 92) in the District Court of the United States for the Southern District of New York, seeking equitable relief from various parties defendant, including the Aluminum Company, its officers, directors,

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* The Pennsylvania Court, litigation, pleading, and decree will hereinafter be referred to as the "Pennsylvania Court", the "Pennsylvania suit", the "Pennsylvania petition", or the "Pennsylvania decree", as the case may be.

and most of its 100% subsidiary corporations, because of alleged violations of the anti-trust laws.*

The law officers of the United States who signed the New York petition (R. 135) and are prosecuting the suit are Homer S. Cummings, as Attorney General of the United States, Robert H. Jackson, as Assistant Attorney General, Wendell Berge, as Special Assistant to the Attorney General, Walter L. Rice, as Special Assistant to the Attorney General, John W. Aiken, as Special Assistant to the Attorney General, F. Gwyn Harper, Jr., as Special Attorney for the United States, N. A. Townsend, Jr., as Special Attorney for the United States, and Lamar Hardy, as United States Attorney in the Southern District of New York.

On April 29, 1937, the Aluminum Company filed a petition (R. 78, 80, 91) in the Pennsylvania suit, praying for an injunction to restrain the law officers of the United States who were prosecuting the New York suit from proceeding with this second action against the Aluminum Company, its 100% subsidiaries, or its officers or directors in their official capacities. The Aluminum Company's petition for injunctive relief was predicated upon the contention that the New York suit embraced subject matter and issues substantially identical with those previously presented and adjudicated in the Pennsylvania suit and over which jurisdiction still remains in the Pennsylvania Court, thereby subjecting the Aluminum Company to the peril of two concurrent decrees on the same subject matter by two courts; and that these two courts, in turn, face the possibility of conflicting decrees and an unseemly conflict. Pursuant to the prayer of the petition and after a

* The New York Court, litigation and petition will hereinafter be referred to as the "New York Court", the "New York suit" or the "New York petition", as the case may be.

preliminary hearing and argument by counsel for both sides, a preliminary injunction (R. 141) was granted, supported by an able opinion (R. 142) by His Honor Judge Gibson, restraining the law officers of the United States who were prosecuting the New York suit from proceeding in that action against the Aluminum Company, its 100% subsidiaries, and its officers and directors in their capacities as such. No injunction was sought or granted to restrain further proceedings against the other defendants, including the stockholders of the Aluminum Company. The law officers of the United States so restrained had been named as parties defendant in the Pennsylvania suit by an *ex parte* order entered April 29, 1937 (R. 135), pursuant to authority vested in the District Court by Section 5 of the Sherman Anti-Trust Act, hereinafter quoted in Appendix A, at page 62.

Answer to the Aluminum Company's petition was filed (R. 153) on June 3, 1937, but before a final hearing could be held, the Attorney General of the United States, on June 8, 1937, filed an expediting certificate (R. 157) under the so-called Expediting Act, hereinafter quoted in Appendix C, at page 63. The available judges of the United States Circuit Court of Appeals for the Third Circuit thereupon impaneled Circuit Judges Davis, Thompson, and Biggs as a statutory Expediting District Court for the Western District of Pennsylvania (R. 160). The said judges held a hearing on the petition for final injunction and seasonably thereafter vacated the preliminary injunction and refused a permanent injunction, pursuant to the terms of a final decree (R. 186) dated July 27, 1937. From that decree the appellant is prosecuting this appeal.

It is necessary to an understanding of the 1937 injunction issue to state the nature of the Government's charges in the Pennsylvania and New York suits.

The Pennsylvania Suit.

The Pennsylvania petition (R. 8) charged in general terms that the Aluminum Company was guilty of restraint of trade and monopolization in violation of Sections 1 and 2 of the Sherman Act. The petition specifically charged the Aluminum Company with entering into contracts with the so-called Neuhausen Company of Switzerland (R. 17), the General Chemical Company (R. 19), the Norton Company (R. 20), the Pennsylvania Salt Manufacturing Company (R. 21), and Messrs. Gustave A. Kruttschnitt and James C. Coleman (R. 22), wherein competition in the aluminum industry was restrained or monopoly promoted by certain portions of each contract. The petition conceded (R. 28) that *until 1909* the Aluminum Company had been a lawful monopoly by virtue of the patent laws but charged (R. 28-30) that both before and after that date the company had monopolized the aluminum industry and restrained competition therein in a manner contrary to law, among other ways by the five contracts above mentioned.

The Pennsylvania decree, in addition to cancelling the restrictive provisions of the five contracts aforementioned and enjoining the making of similar contracts, contained three injunctive provisions of a comprehensive nature which were quite independent of the interdicted contracts.

(1) Paragraph 1 of the decree (R. 64), after perpetually and prospectively enjoining Aluminum Company, its agents and representatives, from carrying out its agreement with Societe Anonyme pour l'Industrie

de l'Aluminum, (the so-called Neuhausen or Swiss Company), and after perpetually and prospectively enjoining the Aluminum Company, acting by itself or through any other person or corporation, from entering into any other agreement of a comparable nature, contained a sweeping injunction against any contract or agreement of the Aluminum Company, acting by itself or through any other person or corporation, adversely affecting the importation of aluminum or alumina or bauxite or any other material from which aluminum can be manufactured or fixing or illegally affecting the prices of any of the same.

(2) The latter portion of paragraph 6 of the decree (R. 69) comprehensively enjoined any contract or agreement by the Aluminum Company, its officers, agents or representatives restricting or controlling output or prices or commerce in aluminum or in any material from which aluminum is manufactured.

(3) Paragraph 7 of the Pennsylvania decree (R. 69-72), among other things, enjoined the Aluminum Company, its officers and agents, from making a combination in any form to control the output or price of any article manufactured from aluminum or from charging any price for crude or semi-finished aluminum that will have the effect of discriminating against a competitor of the Aluminum Company in bidding on contracts for aluminum products.

The pertinent portions of paragraphs 1, 6 and 7 of the Pennsylvania decree are hereinafter quoted in Appendix D at pages 65-69.

It was the intention of the Pennsylvania Court and the Government to regulate the Aluminum Company comprehensively. The Government might have obtained a decree cancelling the restrictive provisions in the

agreements therein mentioned and restraining specific acts therein set forth, without going further, but it did not do so, as we have set forth above. Furthermore, the decree is drawn in terms which apply not only to aluminum, alumina or bauxite but (in paragraph 1) to "any other material from which aluminum can be manufactured" (R. 65). Paragraph 6 (R. 69) not only relates to "commerce in bauxite, alumina, or aluminum" but also to . . . "any branch of the business of manufacturing aluminum goods". Paragraph 7 (R. 69-70) applies to "any branch of manufacturing from crude or semifinished aluminum" and, in sub-paragraph (a), "any product manufactured from aluminum". No new uses of aluminum, no new aluminum alloys, no new subsidiaries, no new plants escape the bans of the Pennsylvania decree because of their newness.

It was the intention of the Pennsylvania Court and the Government to regulate the Aluminum Company perpetually. The fact that its decree (R. 64) avers that it was "entered upon the assumption that the defendant, Aluminum Company of America, has a substantial monopoly of the production and sale of aluminum in the United States" (R. 72) and provides that (R. 72) Aluminum Company may apply for modification only if it should appear to the court that "substantial competition has arisen" and not "oftener than once every three years" demonstrates, independently of everything else, that the decree was intended to operate as a permanent regulation and control, extending for all future time.

Had the Government seen fit to confine the 1912 consent decree to the five contracts above mentioned and other specific acts, it might have done so and thereby left other violations of law for future litigation, when and if such violations of law took place. Instead of that,

the Government sought and obtained a decree not only adjudicating the past but regulating the future in language entirely comprehensive of the aluminum industry regardless of time or size.

The New York Suit.

The New York suit is also a proceeding in equity, filed by the United States on April 23, 1937. The Aluminum Company, with others, is again charged with violating Sections 1 and 2 of the Sherman Anti-Trust Act (R. 105), the details of which violations are averred under three headings. The first (R. 105-108) describes the alleged extent of the monopoly of the Aluminum Company and its subsidiaries thus obtained. The second (R. 108-120) describes the preservation of that monopoly by alleged restraints upon foreign competition. The third (R. 121-133) describes how that monopoly has allegedly been acquired and maintained by unfair and oppressive tactics. The five contracts of which, among other things, complaint was made in the Pennsylvania petition (R. 17-22), are again complained of in the New York petition (R. 110, 122-124).

Each charging paragraph of the New York petition charges the Aluminum Company with violations of the anti-trust laws which, if true, are inhibited by the existing Pennsylvania decree. This fact is the fundamental basis for the contention of the Aluminum Company that the Government is not entitled to maintain the New York action against it.

The New York suit is claimed by the Government to be dissimilar to the Pennsylvania suit in three respects, which we consider immaterial: (1) 62 additional parties defendant have been named; (2) additional relief to that

which has heretofore been sought in the Pennsylvania suit is sought against the Aluminum Company; and (3) facts occurring subsequent to 1912 are averred (all of which, if true, violate the decree in the Pennsylvania suit).

SPECIFICATION OF ERRORS.

The Aluminum Company will urge all of the assigned errors (R. 188-206). Error is averred as follows:

1. The statutory Expediting District Court erred in its findings of fact and conclusions of law that the subject matter and issues involved in the New York suit differ substantially from those in the Pennsylvania suit, that the New York suit does not subject the Aluminum Company to the peril of two conflicting decrees, and that the Aluminum Company will not suffer irreparable injury by being compelled to defend the New York suit. This issue is raised by assignments 6, 7, 8, 12, 13, 14, and 19, (R. 191-192, 194-195, 199), and is discussed at pages 12-34, *infra*.

2. The statutory Expediting District Court erred in concluding that there was no occasion for it to issue an injunction to protect the jurisdiction acquired by the Pennsylvania Court over the subject matter of the Pennsylvania suit or to protect the Aluminum Company from the peril of two decrees existing at the same time in two separate and independent courts of the United States affecting the same subject matter and issues. This issue is raised by assignments 15, 16, 20, 21 and 24 (R. 195-196, 199-200, 202) and is discussed at pages 12-45, *infra*.

3. The statutory Expediting District Court erred in failing to find that the officers, agents and 100% subsidiaries of the Aluminum Company who are named as

parties defendant in the New York suit are the agents and representatives of the Aluminum Company and thereby subject to the Pennsylvania decree. This issue is raised by assignments 18 and 22 (R. 197-198, 201) and is discussed at pages 14-15, *infra.*

4. The statutory Expediting District Court erred in failing to conclude that, if the United States is entitled to the relief prayed for in the New York suit, it can obtain that relief upon proper application to the Pennsylvania Court. This issue is raised by assignment 23 (R. 201) and is discussed at pages 31-33, *infra.*

5. The statutory Expediting District Court erred in concluding that Government counsel had the right to bring about the creation of the Expediting Court and participate in its deliberations and at the same time stand on a special appearance. This issue is raised by assignments 10, 11, 25, 26, 27 (R. 193-194, 203-206) and is discussed at page 51, *infra.*

6. The statutory Expediting District Court erred in entering its final decree of July 27, 1937, wherein it was

> "Ordered, Adjudged and Decreed that the petition filed by Aluminum Company of America on April 29, 1937 is dismissed; that the ex parte order of April 29, 1937 making eight members of the Department of Justice 'parties defendant' is vacated; that the preliminary injunction of May 14, 1937, is vacated; and that the injunctive relief prayed for by Aluminum Company of America is denied."

This issue is raised by assignments 1, 2, 3, 4, 5 and 17 (R. 189-191, 196-197) and is discussed throughout the remainder of the brief.

ARGUMENT.

Summary.

It is the position of the Aluminum Company: (1) that the Government's New York petition embraces subject matter and issues substantially identical with those raised by the Government in the Pennsylvania petition; (2) that the Government cannot lawfully subject the Aluminum Company to the peril of two decrees on substantially identical issues and subject matter, and both it and the courts to the ensuing peril of conflicting regulation by two district courts of coordinate jurisdiction; and (3) that the proper remedy is an injunction issued by the first court, *not* against the second court but against parties attempting to proceed in the second court.

The Aluminum Company does *not* challenge the right of the Government to bring and maintain a suit against any of the *other* defendants in New York or elsewhere, except as such other defendants may be sued in their capacities as the Company's officers, directors, or subsidiaries, all such agents or representatives being bound by the express terms of the Pennsylvania decree. The Aluminum Company does *not* contend that the Government can only proceed against it by a contempt proceeding in the Pennsylvania suit, for it recognizes and admits that the Government may proceed against it by supplemental petition in the Pennsylvania suit and secure any additional relief, including dissolution, to which the Government may prove itself entitled. Such a supplemental proceeding is the orthodox method of supplementing litigation against one already regulated by an anti-trust decree.

It is the position of the Aluminum Company that the validity of the service of process upon the law officers of the United States whom the Aluminum Company has sought to enjoin from proceeding with the New York suit is established on three grounds, each believed to be conclusive: (1) The United States and the predecessors in office of its law officers here involved voluntarily submitted to the jurisdiction of the Pennsylvania Court by bringing the Pennsylvania suit. The present law officers, being successors in office and therefore in privity with their predecessors, are subject to any proper orders or decrees of the Pennsylvania Court upon being given due notice of what is contemplated: Such notice was given. (2) Additionally, these law officers were joined as parties defendant and served with process in the Pennsylvania suit by *ex parte* order entered April 29, 1937 (R. 135), upon authority vested in the court by Section 5 of the Sherman Act. (3) These law officers have voluntarily submitted to the jurisdiction of the Pennsylvania Court by invoking the so-called Expediting Act of 1903 and bringing about the creation of a statutory Expediting District Court composed of three circuit judges.

I.

The Pennsylvania and New York Suits Are Substantially Identical in Subject Matter and Issues.

This identity is established in two ways. (1) It is revealed by a comparison of the Pennsylvania and New York petitions. (2) It is established by a comparison of the charges in the New York petition with the prohibitions of the Pennsylvania decree.

1. THERE IS A STRIKING SIMILARITY BETWEEN THE NEW YORK AND PENNSYLVANIA PETITIONS. The first 39 paragraphs (R. 95-105) of the New York petition state

averments necessary to jurisdiction and venue and describe the defendants and the aluminum industry, but in themselves contain no averments of wrongdoing. Exactly the same ground is covered in the Pennsylvania petition in paragraphs I, III, and XV (R. 9, 12, 30).

Paragraph 40 (R. 105) of the New York petition states in comprehensive terms, to be detailed in succeeding paragraphs, that the Aluminum Company has been guilty of restraints of trade and monopolization in violation of Sections 1 and 2 of the Sherman Act. The same charge is made in paragraph II (R. 9) of the Pennsylvania petition, likewise to be detailed in succeeding paragraphs.

Paragraph 41 (R. 105) of the New York petition charges that excessive profits have been made, repeating a similar charge in paragraph XIII (R. 27) of the Pennsylvania petition.

Paragraphs 42 to 53 (R. 106-108) of the New York petition state the large proportion of various lines of business allegedly held by the Aluminum Company and the claimed monopolization thereby created. The same charge is found in paragraph IV (R. 12-17) of the Pennsylvania petition.

Paragraphs 54 to 82 (R. 108-120) of the New York petition aver the maintenance of the alleged monopoly by agreements and conspiracies designed to prevent the importation of aluminum and aluminum products, a charge likewise contained in paragraph V (R. 17-19) of the Pennsylvania petition.

Paragraphs 83 to 100 (R. 121-131) of the New York petition aver the maintenance of the alleged monopoly by acts and agreements in restraint of trade and oppressions. The same charge was made in paragraphs VI to XII (R. 19-26) of the Pennsylvania petition.

Paragraph 100 (R. 131) of the New York petition paraphrases in concise form paragraph X (R. 23) of the Pennsylvania petition.

Paragraph 101 (R. 132) of the New York petition charges excessive prices, an averment which is also made in paragraph XIII (R. 27-28) of the Pennsylvania petition.

Paragraphs 102 and 103 (R. 132) of the New York petition simply summarize the effect of the previously alleged wrongful acts and the desirability of free competition much as a similar summary is made in paragraph XIV (R. 28-30) of the Pennsylvania petition.

One might suppose, and perhaps quite accurately, that the draftsman of the New York petition had the Pennsylvania petition opened before him as he drafted the second petition.

2. NOT ONLY ARE THE NEW YORK AND PENNSYLVANIA PETITIONS SUBSTANTIALLY IDENTICAL IN THE NATURE OF THEIR CHARGES BUT THE PENNSYLVANIA DECREE WAS SO DRAWN THAT IT ENJOINED NOT ONLY THE PRACTICES CHALLENGED IN THE PENNSYLVANIA PETITION BUT LIKEWISE THE SIMILAR ONES AVERRED IN THE NEW YORK PETITION. The Government does not deny that the Pennsylvania decree is in full force and effect, or that it was intended to operate prospectively and to interdict contracts, combinations, or agreements entered into subsequent to 1912 quite as definitely as those made prior to that date. An analysis of the New York petition (R. 92) will demonstrate that it makes no charges that are not enjoined by the Pennsylvania decree (R. 64).

The Pennsylvania decree (R. 64) is binding upon not only the Aluminum Company but its officers, agents and representatives. The testimony is undisputed (R. 213-214, 225-226, 230-241), that some twenty of the cor-

porate defendants in the New York suit are 100% subsidiaries of the Aluminum Company, operated as departments of its business and that an additional nineteen defendants are present or former officers or directors of the Aluminum Company. Judge Gibson made appropriate findings to this effect (R. 144-145) but the Expediting Court failed to do so, presumably because such a finding of fact was immaterial to its view of the case. Certainly it requires no demonstration that the 100% subsidiaries of the Aluminum Company are its agents and representatives.

The New York petition contains 103 numbered paragraphs. The first two paragraphs (R. 95-96) set forth the jurisdiction and venue. Paragraphs 3 to 35, inclusive (R. 96-104), describe the various defendants. Paragraphs 36 to 39, both inclusive (R. 104-105) are descriptive of the aluminum industry.

Paragraph 40 (R. 105) is the first charging paragraph. It charges in general terms that the Aluminum Company has monopolized and restrained and attempted to monopolize and restrain interstate and foreign commerce in bauxite, alumina, aluminum, and products manufactured therefrom, in the various ways detailed in the succeeding paragraphs of the petition, paragraph 40 concluding with the statement that the general charges of monopolization and restraint "will now be described in further detail, that is to say".

Paragraphs 41 to 53 (R. 105-108) set forth the extent to which it is alleged that the Aluminum Company has obtained a monopoly by the contracts, combinations, and agreements characterized in general terms in paragraph 40 of the petition, and detailed in paragraphs 54 and following, and state the alleged effect of such monopoly. Paragraph 41 charges that the effect of such monopoly has been to make possible excessive profits.

Paragraph 53 states that the effect of this alleged monopoly, claimed to have been brought about by contracts, combinations and agreements in restraint of trade, results in the power to control production and prices.

The New York petition next charges that the monopoly complained of in paragraphs 41 to 53 has been brought about and preserved (1) by restraints upon foreign competition, as detailed in paragraphs 54 to 82, both inclusive (R. 108-120), and (2) by unfair and oppressive tactics, detailed in paragraphs 83 to 100, both inclusive (R. 121-131). Each and every such practice and any resulting monopolization or restraint are enjoined by paragraphs 1, 6 or 7 of the Pennsylvania decree, hereinafter quoted at pages 65-69.

It was argued by the Government in the Court below that paragraph 53 (R. 108) of the New York petition alleges that the Aluminum Company is a monopoly irrespective of the devices employed to preserve and extend that monopoly and that this is a charge not made in the Pennsylvania petition. It is submitted that the Government is mistaken in both contentions. There is no more of an independent charge of monopolistic power *per se* in paragraph 53 of the New York petition than is found in paragraph XI (R. 25-26) of the Pennsylvania petition. The possibility of abuses of such power is completely covered by paragraphs 1, 6 and 7 of the Pennsylvania decree. Paragraph 53 of the New York petition avers power in the Aluminum Company to fix prices and suppress competition by virtue of an alleged 100% monopoly of the production and sale of alumina and virgin aluminum in the United States. This paragraph is one of a number in the subdivision of the petition captioned "Monopoly of Aluminum Company and Subsidiaries" (R. 105), the details as to the alleged monop-

oly in alumina and aluminum appearing in paragraphs 44 and 45 (R. 106). This entire subdivision of the petition is in explanation of paragraph 40 (R. 105), which charges that the Aluminum Company has monopolized and restrained commerce by contracts, combinations and conspiracies which, the paragraph concludes, "will now be described in further detail, that is to say". Paragraph 53 is plainly no more than a specification of paragraph 40. The general charge of monopolization and restraints by means of contracts, combinations and conspiracies contained in paragraph 40 is to be read in connection with the entire balance of the New York petition for the reason well set forth by this Court in *Swift & Co. v. United States,* 196 U. S. 375 (1905, opinion by Mr. Justice Holmes) where it was said, in determining the relation between general and specific charges in that petition (p. 395):

> "But after all the specific charges there is a general allegation that the defendants are conspiring with one another, the railroads and others, to monopolize the supply and distribution of fresh meats throughout the United States, etc., as has been stated above, and it seems to us that this general allegation of intent colors and applies to all the specific charges of the bill. Whatever may be thought concerning the proper construction of the statute, a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech. Thus read this bill seems to us intended to allege successive elements of a single connected scheme."

The detailed charges in paragraphs 54 to 82 of the New York petition are fairly summarized in the petition

heading (R. 108): **"Preservation of Monopoly by Restraints upon Foreign Competition."** Paragraph 54 (R. 108) comprehensively charges such restraints in general terms, which, it concludes, "will now be described in greater detail, that is to say" (R. 109). Paragraphs 55 to 82, both inclusive (R. 109-120), set forth in detail the various alleged combinations, contracts, and agreements with foreign producers which are included in the general language of paragraph 54. Some are alleged to have been brought about by intimidation. Agreements with foreign competitors, so induced, to refrain from shipping goods into the United States are quite as much contracts, combinations or conspiracies, as the case may be, as if such foreign competitors were paid by the Aluminum Company for such failure to compete. Combination and conspiracy are all-inclusive terms (footnote, *infra*, p. 66). The same thing is true if interlocking interests were obtained with the foreigners for that purpose.

The averments that Aluminum Company formed Aluminium Limited (paragraph 72—R. 116), that these two companies do not compete in each other's market because of an agreement or understanding, whether brought about by reason of common control or otherwise (paragraph 74—R. 117), that Aluminium Limited was formed with the intent and purpose of transferring to it the contractual obligations which Aluminum Company had entered into with foreign producers and to enable Aluminium Limited to enter into further contractual obligations with the foreign producers, restricting competition in world markets and curtailing the importation of aluminum into the United States (paragraph 75—R. 117), that the policies of Aluminium Limited are being directed through the common control of it and Aluminum Company, resulting in contractual arrangements and understandings pursuant

to which importations of aluminum into the United States have been restrained (paragraph 76—R. 117), that pursuant to this policy and for these purposes Aluminium Limited has made various contracts with foreign producers (paragraphs 77 to 80*, both inclusive, and 82 —R. 118-120), charge nothing more than a combination or agreement between Aluminum Company and Aluminium Limited, a potential importer of foreign aluminum, to restrain importations of its aluminum and perhaps the product of other potential foreign importers.**

Such restraining agreements, combinations or understandings to restrain the importation of aluminum, alleged in both suits to be for the purpose of monopolization, were comprehensively enjoined by paragraph 1 (R. 64-65, quoted *infra,* pp. 65-66) of the Pennsylvania decree. Such restraints on importation are likewise enjoined by paragraph 6 (R. 69, quoted *infra,* pp. 66-67) of the Pennsylvania decree, inasmuch as they are necessarily combinations or agreements for the purpose, or having the effect, of controlling domestic output or prices or the obtaining of a supply of bauxite, alumina,

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* Paragraph 81 (R. 120) is not a charging paragraph, but purports to state what acquisitions by the Aluminum Company were contemporaneously submitted to the Department of Justice.

** If the Aluminum Company is charged in the New York petition to have conspired with its stockholders or with Aluminium Limited stockholders to control Aluminium Limited, that is a plain combination or conspiracy and is of course forbidden by paragraph 1 of the Pennsylvania decree (*infra,* pp. 65-66). On the other hand, if the New York petition does not charge that the Aluminum Company has so combined with its stockholders or with the stockholders of Aluminium Limited, then no offense is charged against Aluminum Company and the suit of the United States as to these matters is against the stockholders individually. The Aluminum Company does not claim that the United States should be enjoined, nor was it ever so enjoined from proceeding against the individual stockholders in the New York suit or against anybody except the Aluminum Company, its officers and directors in their capacities as such, and its 100% subsidiaries.

or aluminum, any and all of which contracts, combinations or agreements are prohibited by this paragraph of the decree.

Paragraphs 83 to 103, both inclusive (R. 121-133), of the New York petition are accurately characterized in the petition by the heading **"Acquisition and Maintenance of Monopoly by Unfafr and Oppressive Tactics"** (R. 121).

Paragraph 83 (R. 121) avers generally that the monopolistic control of the aluminum industry in the United States by the Aluminum Company has been brought about and maintained by various allegedly oppressive agreements and understandings and by contracts and combinations and conspiracies in restraint of trade "which will now be described in greater detail, that is to say", the details following in paragraphs 84 to 100, both inclusive (R. 121-131). The alleged contracts, combinations, and conspiracies in restraint of trade are set forth in paragraphs 84 to 97, both inclusive (R. 121-128), and the alleged oppressive tactics are averred in paragraphs 98 to 100, both inclusive (R. 129-131).

Paragraph 98 (R. 129) charges that competitors of the Aluminum Company, to-wit, Sheet Aluminum Corporation and Fairmont Aluminum Company, have been interfered with because Aluminum Company has had control of the prices of virgin aluminum, as well as aluminum sheet, and has so reduced the spread of the prices between these two products that these two competitors could not buy virgin aluminum, fabricate it and sell it as sheet except at a loss. The charge is that the price of virgin aluminum is kept too high as compared with the price of sheet.

Paragraph 99 (R. 130) charges that the Baush Machine Tool Company has been similarly oppressed be-

cause of the spread between the prices of virgin aluminum and of aluminum alloy sheet.

Paragraph 100 (R. 131) charges discriminations in favor of subsidiaries of the Aluminum Company as against competitors of that company and the harassment of said competitors. It is a remarkably close paraphrase of paragraph 7 of the Pennsylvania decree.

The restraints and oppressions charged in paragraphs 83 to 100, both inclusive, of the New York petition are comprehensively and prospectively enjoined by paragraphs 6 and 7 (R. 69-71, quoted *infra,* pp. 66-69) of the Pennsylvania decree. Paragraph 6 deals with restraints which affect output, prices, or sources of aluminum or of raw materials, and paragraph 7 forbids discriminatory and oppressive practices of exactly the character complained of in both the Pennsylvania and New York suits.

A number of the abuses referred to in the New York petition (paragraphs 56, 86, 87, 88 and 90) are expressly forbidden by the Pennsylvania decree.*

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* Paragraph 56 (R. 110) of the New York petition complains of a contract between Northern Aluminum Company, Ltd., a subsidiary of Aluminum Company, and Societe Anonyme pour l'Industrie de l'Aluminum, the performance of the illegal portions of which was specifically enjoined by paragraph 1 (R. 64) of the Pennsylvania decree.

Paragraph 86 (R. 122) of the New York petition, complains of a contract between Aluminum Company and General Chemical Company, the performance of the illegal portions of which was specifically enjoined by paragraph 2 (R. 65) of the Pennsylvania decree.

Paragraph 87 (R. 122) of the New York petition complains of a contract between Aluminum Company and Pennsylvania Salt Manufacturing Company, the performance of the illegal portions of which was specifically enjoined by paragraph 4 (R. 68) of the Pennsylvania decree.

Paragraph 88 (R. 123) of the New York petition complains of a contract between Aluminum Company and Norton Company, the per-

Paragraph 101 (R. 132) of the New York petition charges a 1¢ per pound price advance which is said to be an exercise of the Aluminum Company's power to fix oppressive and unreasonable prices. Control of prices by combination, contract, or agreement is regulated by paragraphs 1 and 6 of the Pennsylvania decree and the practices which are alleged in the New York petition to have vested this power in the Aluminum Company are regulated in comprehensive terms by paragraphs 1, 6, and 7 of the Pennsylvania decree.

Paragraphs 102 and 103 (R. 132) of the New York petition set forth no additional wrongful acts. They recite the effect of the previously alleged wrongful acts, the desirability of free competition to the end that the existing monopoly should be destroyed, and that all the defendants should be restrained from continuing the various wrongful practices, very much as set forth in paragraph XIV (R. 28-30) of the Pennsylvania petition.

Thus each paragraph in the New York petition which purports to charge a violation of law deals with a charge which, if true, is not only paralleled by a similar charge in the 1912 petition but is enjoined by specific paragraphs of the Pennsylvania decree.

As Judge Gibson aptly pointed out in his opinion in the case at bar (R. 152):

> "The injunctive relief granted in the decree in this District (the consent decree) might well answer all the prayers of the New York petition except that for the dissolution of the Company. Dissolution of

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formance of the illegal portions of which was specifically enjoined by paragraph 3 (R. 67) of the Pennsylvania decree.

Paragraph 90 (R. 124) of the New York petition complains of a contract between Aluminum Company and Gustave A. Kruttschnitt and James C. Coleman, the performance of the illegal portions of which was specifically enjoined by paragraph 5 (R. 68) of the Pennsylvania decree.

the defendant, it will be remembered, was made the subject matter of a supplemental bill in United States v. International Harvester Co., supra."

3. THE GOVERNMENT'S ATTEMPTED DISTINCTION OF THE PETITIONS. The Government contended in the Court below that the two petitions do not present substantially identical issues and subject matter because in the New York suit (1) additional parties defendant have been named; (2) additional relief is sought against the Aluminum Company; and (3) facts occurring subsequent to 1912 are averred. It is submitted that these distinctions are without legal significance on the issue of whether the law officers of the United States should be restrained from proceeding against the Aluminum Company in the New York action.

A. *New parties.* There are 63 parties defendant* in the New York suit, of whom the Aluminum Company is one, and only the Aluminum Company in the Pennsylvania suit. The Aluminum Company is *not* seeking to enjoin the law officers of the Government from proceeding in New York against anyone but itself, its officers, directors, and 100% subsidiaries, all of whom are bound by the explicit terms of the Pennsylvania decree. The Aluminum Company is *not* seeking to restrain the prosecution of the New York suit against its stockholders to compel them to divest themselves of their Aluminum Company stock or their holdings in Aluminium Limited nor is it seeking to enjoin the prosecution of the suit against any of the corporations or individuals not parties to or bound by the Pennsylvania decree.

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* Twenty of the corporate defendants are 100% subsidiaries and 19 individual defendants are present or former officers or directors of Aluminum Company.

The joinder of these additional parties cannot have the legal effect of permitting the United States to ignore the Pennsylvania decree against Aluminum Company and proceed *de novo* as to it: *Thompson v. Roberts,* 24 How. 233, 241 (1860, opinion by Mr. Justice Grier); *Green v. Bogue,* 158 U. S. 478, 503 (1895, opinion by Mr. Justice Shiras). In *Thompson v. Roberts,* this Court ruled (p. 241):

> "The objection that the parties were not the same in both suits cannot be sustained.
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> . . . . . .
>
> ". . . No good reason can be given why the parties in this case, who litigated the same question, should not be concluded by the decree, because others having an interest in the question or subject-matter were admitted by the practice of a court of chancery to assist on both sides."

Needless to say, it makes no difference whether the added parties are in the first or second suit: 1 *Freeman on Judgments,* Section 417.

There is no hardship in such a rule, for the Expediting Court, in whose hands the Pennsylvania suit has now been placed, may permit the Government to add as parties defendant every party to the New York suit (Section 5 of the Sherman Act, *infra,* p. 62), and it may decree supplemental relief in the Pennsylvania suit either with or without addition of other parties defendant, including the dissolution of the Aluminum Company, assuming that the Government can make out a case on the merits (*infra,* pp. 31-33).

B. *Additional relief.* In the Pennsylvania suit an injunction was sought (R. 31-36), while in the New York suit the Government seeks both an injunction (R. 133)

and a dissolution (R. 134) of the Aluminum Company.* The prayer for dissolution is simply a request for additional relief. It in no wise changes the conclusive effect of the Pennsylvania suit. Were it otherwise, it would be a simple matter to avoid the binding effect of any decree. Furthermore, dissolution could have been decreed under the general prayer in the Pennsylvania petition: 4 *Cyclopedia of Federal Procedure,* Section 1048, at pages 71-73.

In *Green v. Bogue, supra,* 158 U. S. 478, 502, it was ruled:

> ". . . we do not deem the fact that a different form or measure of relief is now asked deprives the defendants in error of the protection of the prior findings and decree in their favor."

A ruling to the same effect is found in *Fidelity & Deposit Company v. Gaston, Williams & Wigmore,* 13 F. (2d) 267, 268 (S. D. N. Y., 1926, opinion by Judge Bondy), where it was held:

> "The mere fact that the complainant changes his prayer for relief does not affect the decree in the former suit as a bar to this suit. See Green v. Bogue, 158 U. S. 478, 15 S. Ct. 975, 39 L. Ed. 1061; In re Samuels (C. C. A.) 263 F. 561; Coleman v. Apple (C. C. A.), 298 F. 718."

The authorities are summarized in 2 *Freeman on Judgments,* Section 683, as follows:

> "If the claim or cause of action is substantially the same in both actions it is not material that the relief demanded is in some measure different."

In the Court below, the Government was able to cite no case to the contrary which was not fundamen-

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*The prayer in the New York petition for relief against the stockholders of Aluminum Company is not material here, because no attempt is made to enjoin the prosecution of the action as to them.

tally different in that the party unsuccessfully sought to be bound in those cases by an earlier decree was not a party to the first decree or that the relief sought in the second case was not the kind of relief which the court could have granted in the first case. We have no quarrel with such cases, for it cannot be argued that dissolution could not have been or may not yet be sought and obtained upon a proper showing in the Pennsylvania suit.

C. *New facts.* The Government claims that a great many of the 100% subsidiaries of Aluminum Company who are parties defendant in the New York suit were created after the Pennsylvania decree and that a great many of the alleged facts set forth in the New York petition occurred subsequent to 1912. Conceded. But it does not follow that the issues and subject matters are dissimilar for this reason. Witness the supplemental decree of October 25, 1922, passing upon property acquisitions taking place in 1922. If there were merit to the Government's contention, there could be no such thing as an injunction to operate prospectively on situations defined as to consequence but not otherwise in being. **The Pennsylvania decree was not confined to then existing situations but was designedly drawn as a comprehensive and permanent regulation of the future.**

As a demonstration of this, let the agreements which are alleged in the New York petition to have been made since 1928 between Aluminum Company and Aluminium Limited and between Aluminium Limited (allegedly on behalf of Aluminum Company) and others (paragraphs 74 to 81, R. 117-120), be tested by the decree. The invalidity asserted in regard to such alleged agreements is their restraint upon the importation of aluminum into the United States. Such

restraining agreements, in any garb, are clearly prohibited by paragraph 1 of the Pennsylvania decree (R. 64-65, quoted *infra*, pp. 65-66), although Aluminium Limited was not formed until 1928.

Identity of causes of action does not depend upon identity of facts. This is shown by *Baltimore Steamship Co. v. Phillips*, 274 U. S. 316, 321 (1927, opinion by Mr. Justice Sutherland), where this Court said:

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. "The *thing*, therefore, which in contemplation of law as its *cause*, becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.*"' *Chobanian v. Washburn Wire Company*, 33 R. I. 289, 302." (Italics by this Court).

A fortiori must this be true of a cause of action culminating in a regulatory decree of an ever changing business, a decree characterized in *United States v. Swift & Co.*, 286 U. S. 106, 114 (1932, opinion by Mr. Justice Cardozo), as:

> "A continuing decree of injunction directed to events to come. . . . . The distinction is be-

tween restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative."

The Pennsylvania decree is admittedly of the latter character.

II.

The Law Officers of the United States Should Be Enjoined from Proceeding in the New York Suit.

1. THE EQUITY OF SUCH AN INJUNCTION IS STRONG.

The United States, through its law officers, is attempting to prosecute the Aluminum Company in the New York suit on matters which are fully regulated by continuing decree of the Pennsylvania Court. That is unjust to both courts and prejudicial to the Aluminum Company.

If the courts permit themselves to be maneuvered into this position, they are in danger of an unseemly conflict over a subject matter which by the voluntary act of the United States has been entrusted to the Pennsylvania Court.

The Aluminum Company stands in peril of regulation by decrees of two independent courts operative at the same time on the same subject matter. The Aluminum Company has relied upon the Pennsylvania decree for 25 years as a guide in its business conduct and in 1922 it spent large sums of money in the acquisition of properties upon the strength of a supplemental decree (R. 77) of the Pennsylvania Court. Hereafter it will be necessary to submit such matters to both courts, assuming that the New York Court were to enter an in-

junction order comparable in scope to the Pennsylvania decree.

If the Government is correct in its theory that it may proceed against the Aluminum Company in the New York suit, the following extraordinary situation results: Whatever the decree in the New York suit may be, the Government can still relitigate the same charges thereafter in the Pennsylvania suit by contempt proceedings or even by a supplemental application for dissolution filed in the Pennsylvania suit. If, after a hearing on the merits in the New York suit, the New York Court should either dismiss the petition or grant the relief prayed for, the above mentioned situation will exist because the Pennsylvania decree remains in full force and effect, regardless of the New York decision. Surely such a situation should not be permitted to arise.

We do not contend that the Pennsylvania decree is a contract, although it was entered by consent. We recognize full well the power of the Pennsylvania Court to change its decree in any appropriate way, even to the extent of dissolving the Aluminum Company. However, we do urge, with deference, that the Pennsylvania decree should not be enlarged in any way without a showing by the Government that there is a need for such further relief. Until such a showing has been made the Aluminum Company is entitled to rely upon the Pennsylvania decree. This position is justified by *United States v. International Harvester Co.*, 274 U. S. 693, 703 (1927, opinion by Mr. Justice Sanford) where this Court said of another consent decree:

> "And a construction of this decree by which, although its requirements have been fully complied with and lawful competitive conditions established, the United States would nevertheless be entitled to further relief by the division of the International

> Company into separate and distinct corporations for the purpose of restoring the actual competitive conditions that had existed sixteen years before the entry of the consent decree, would plainly be repugnant to the agreement approved by the court and embodied in the decree, which has become binding upon all parties, and upon which the International Company has, in the exercise of good faith, been entitled to rely." (Emphasis added).

And to add to the inequity of the situation, the United States now proposes to try the Aluminum Company for its very life at a point distant from its principal office. It appears on the face of the New York petition that the principal offices of Aluminum Company and the place of residence of practically all the officers and directors of that company are in or about the City of Pittsburgh (R. 96, 102). The testimony to this effect was uncontradicted (R. 215, 226). The books and records of the company covering a period of approximately fifty years are also located in or near the City of Pittsburgh. The business operations of the company depend upon the continued presence of the officers at their usual place of business and of the books and records of the company at points where they are accessible in the daily operation of that business. The trial of the Government's charges in New York rather than in Pittsburgh will make it unnecessarily difficult either to defend properly the charges or to carry on the Company's business in an orderly manner. This situation is fully developed in Judge Gibson's findings (R. 145-147). The Expediting Court was unimpressed (R. 185) with the argument and made no findings on the point.

The Aluminum Company is not seeking an injunction on the ground of inconvenience but upon the much more fundamental proposition that it should not be en-

joined for the same acts by two independent courts of coordinate jurisdiction. It points out the inconvenience of suit in New York simply as an additional factor to be weighed.*

There is no countervailing hardship upon the United States, for if it were enjoined from proceeding in New York, it is left with two alternatives which, we submit, are entirely adequate: (1) It may enforce the decree that it has obtained; or (2) it may reopen the Pennsylvania suit by supplemental proceeding and seek any kind of relief that appears suitable, including dissolution of the Aluminum Company.

The first alternative needs no comment. As to the second, the Government, if it were so minded, could proceed by supplemental petition in the Pennsylvania suit, repeating in such supplemental petition every averment contained in the New York petition and, by invoking Section 5 of the Sherman Act (hereinafter quoted in Appendix A, *infra,* p. 62); join every one of the sixty-two defendants added to the New York suit as defendants to the Pennsylvania suit.

The Pennsylvania court has full power to modify its existing decree by force of principles, inherent in the jurisdiction of the chancery, a continuing decree of injunction directed to events to come being subject always to adaptation as events may shape the need. This Court so ruled in *United States v. Swift & Co., supra,* 286 U. S. 106, 114-115, Mr. Justice Cardozo stating for this Court:

"We are not doubtful of the power of a court

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* Injunctions have been granted on the sole ground that a suit has been brought in a jurisdiction, admittedly having jurisdiction over the parties, but unnecessarily inconvenient and vexatious: *Bankers Life Co. v. Loring,* 217 Iowa 534, 250 N. W. 8 (1933, opinion by Mr. Justice Anderson); *Reed's Administratrix v. Illinois Central R. R. Co.,* 182 Ky. 455, 206 S. W. 794 (1918, opinion by Judge Carroll).

of equity to modify an injunction in adaptation to changed conditions though it was entered by consent. The power is conceded by the Government, ... Power to modify the decree was reserved by its very terms, ... If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. . . . The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative. . . . The result is all one whether the decree has been entered after litigation or by consent. . . . In either event, **a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.**" (Emphasis added.)

In another historic anti-trust litigation, *United States v. American Can Co.*, 234 Fed. 1019 (D. Md., 1916, opinion by Judge Rose), the Court pointed out that if an injunction should prove ineffective, the Government could always reopen the proceeding and move for a dissolution, stating (p. 1021):

> "It is, of course, possible that these forecasts of the future may not be realized. In that event the retention of jurisdiction will enable the government promptly and cheaply to compel a dissolution whenever anything which defendant may hereafter do, or whenever anything which may hereafter happen makes such action necessary or expedient."

There would be nothing novel in proceeding by such supplemental petition in the Pennsylvania Court. The novelty is presented in starting a second suit to litigate that which is already under regulation by the Pennsylvania Court. So far as careful search has revealed to us, this is the first case involving substantial identity of subject matter in which the United States has failed to proceed by supplemental petition in the court where jurisdiction was originally invoked. For example: Among the oil companies separated by the Standard Oil dissolution decree of 1911 were the Standard Oil Company of New York and the Vacuum Oil Company. When these two companies sought to merge nineteen years later, the Government proceeded by supplemental petition in the court having original jurisdiction to enjoin the merger as a violation of the 1911 decree: *United States v. Standard Oil Company of New Jersey,* 47 F. (2d) 288 (E. D. Mo., 1931, opinion by Judge Stone).

Again, when the United States became dissatisfied with the efficacy of an anti-trust decree obtained against the International Harvester Company in 1918 as a result of a petition filed in 1912, it did not start a new proceeding but, in 1923, filed a supplemental petition in the old action, praying that the original decree be reopened and amended to the end that the International Harvester Company might be dissolved: *United States v. International Harvester Co., supra,* 274 U. S. 693.

When the large meat packers became dissatisfied with the anti-trust decree entered against them in 1920, they proceeded ten years later by a petition in the original action to seek a modification of that decree: *United States v. Swift & Co., supra,* 286 U. S. 106.

In each of the foregoing cases the court entertained and decided the supplemental petitions on their merits.

On what premise can one justify a second decree in another Court? Complaint cannot be found with the administration of the decree by the Pennsylvania Court. The United States consented to the original decree and its clarification in 1922 (R. 73, 78). There have been no other actions under it.

There is no doubt that in 1912 the Aluminum Company was, and that it still is, the only producer of virgin aluminum in this country. So long as that condition exists the company must be subject to regulation and control by the courts. That is precisely what the Pennsylvania decree accomplished. The restrictions and regulations of that decree continue indefinitely. They are in terms designed to include new facilities and new methods. It is only when "substantial competition has arisen, either in the production or sale of aluminum in the United States" that the company may petition the court to modify the decree and then only once in three years (R. 72). The Government has the right to seek enlargement or enforcement of the decree at any time.

In the future, proceedings in the Pennsylvania suit must be handled by the available Circuit Judges sitting as a statutory Expediting District Court. This should be satisfactory to the Government, for it was its act in filing the Expediting Certificate that removed this case permanently, in all its present and future aspects, including interpretation and enforcement and amplification or modification, to the available Circuit Judges. The Expediting Act (Appendix C, *infra*, pp. 63-65) and the Expediting Certificate (R. 157) show that the Pennsylvania suit has henceforth been turned over to the Expediting Court.

2. It was the duty of the Pennsylvania Court to grant such an injunction.

The right and the duty of the Pennsylvania Court, having first acquired jurisdiction of the cause of action, to restrain proceedings by the Government in the New York Court to relitigate the same questions, is well established. It is predicated on two grounds: (1) The duty of the Pennsylvania Court to protect its jurisdiction over the subject matter entrusted to it and thereby prevent the possibility of a conflict of authority; and (2) the duty of all courts to prevent parties litigant from being harassed by relitigation of matters once determined. The right and duty to preserve jurisdiction is predicated both upon powers inherent in a court of equity and upon statute*. The prevention of relitigation of matters once determined goes beyond the relitigation of issues which are *res adjudicata*. This is developed in the cases which follow:

Kessler v. Eldred, 206 U. S. 285 (1907, opinion by Mr. Justice Moody), illustrates the fact that injunctions are not limited to the prosecution of cases which raise issues which are *res adjudicata*. There Kessler, defendant in a patent infringement suit, had obtained a dismissal of the action. Subsequently the plaintiff, Eldred, sued certain of Kessler's customers, whereupon Kessler sought but was refused an injunction against further prosecution of such suits. This ruling was reversed on appeal, this Court ruling that Kessler was entitled to an injunction, stating (p. 289):

> "If rights between litigants are once established by the final judgment of a court of competent jurisdiction those rights must be recognized in every way,

*Section 262 of the Judicial Code, which authorizes United States courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions."

and wherever the judgment is entitled to respect, by those who are bound by it."

This Court held it unnecessary to determine whether the principle of *res adjudicata* was applicable, inasmuch as the injunction was justified on the broader ground that the subject matter of both suits had been litigated in the first and that Kessler was, by the implications of the first judgment, fairly entitled to have his customers free from suit. The exclusion of the issue of *res adjudicata* was in these words (p. 288):

"Whether the judgment between Kessler and Eldred is a bar to the suit of *Eldred v. Breitwieser*, . . . we deem it unnecessary to inquire. . . . It may be that the judgment in *Kessler v. Eldred* will not afford Breitwieser, a customer of Kessler, a defense to Eldred's suit against him. Upon that question we express no opinion."

This Court held in *Looney (Attorney General of Texas) v. Eastern Texas R. R. Co.*, 247 U. S. 214, 221 (1918, opinion by Mr. Justice Clarke), that:

"The use of the writ of injunction, by federal courts first acquiring jurisdiction over the parties or the subject-matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties, is familiar and long established practice . . . ."

A comparable ruling was made in *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (1935, opinion by Mr. Justice Sutherland), wherein the power of a court of bankruptcy as a court of equity to protect its jurisdiction by injunction was sustained. In this case the injunction applied to threatened sales of collateral under contracts between the bankrupt railroad and certain

banks. It was not contended that the rights of the banks had been adjudicated by the bankruptcy court. Rather, the injunction was founded on the right of the bankruptcy court to preserve exclusive jurisdiction of the property of the railroad. It was said of bankruptcy courts and their right to issue injunctions that (p. 675-676):

"They are essentially courts of equity, and their proceedings inherently proceedings in equity. . . . Their adjudications and orders constitute in all essential particulars decrees in equity. . . . The power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is, therefore, inherent in a court of bankruptcy, as it is in a duly established court of equity. Section 262 of the Judicial Code, which authorizes the United States courts 'to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions' recognizes and declares the principle. An example of its application is found in *Kline v. Burke Construction Co.*, 260 U. S. 226, 229, where we held that a federal court, having first acquired jurisdiction of the subject matter, could enjoin the parties from proceeding in a state court of concurrent jurisdiction 'where the effect of the action would be to defeat or impair the jurisdiction of the federal court.' An injunction may be issued in such circumstances for the purpose of protecting and preserving the jurisdiction of the court 'until the object of the suit is accomplished and complete justice done between the parties.' *Looney v. Eastern Texas R. Co.*, 247 U. S. 214, 221."

In *Steelman, Trustee v. All Continent Corporation*, 301 U. S. 278 (1937, opinion by Mr. Justice Cardozo), this Court reinstated an action of the District Court of

the United States for the District of New Jersey, acting in bankruptcy, enjoining the prosecution of a subsequent litigation in the District Court of the United States for the Eastern District of Pennsylvania brought by a party other than the bankrupt to remove a cloud on the record title to certain assets in which the trustees in bankruptcy appointed by the New Jersey Court claimed an interest. After a full discussion of the applicable authorities this Court, speaking by Mr. Justice Cardozo, reinstated the injunction and, in commenting on the authority of the District Court to issue it, said (p. 289):

> "'. . . this court has said that 'the power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is . . . inherent in a court of bankruptcy, as it is in a duly established court of equity.'"

Further (pp. 290-291):

> "Much of the argument for the respondent has been directed to a showing that the suit in Pennsylvania is not subject to restraint for defect of jurisdiction, and this for the reason that the *res* to be affected—the securities held by Sparks & Co. in their office in Philadelphia—had not come within the actual or constructive possession of the court of bankruptcy in New Jersey when the suit was begun to remove the cloud upon title. . . . The argument misconceives the grounds upon which the trustee looks to us for aid. The trustee does not challenge the jurisdiction of the federal court in Pennsylvania, if the word jurisdiction be taken in its strict and proper sense. . . . He is not seeking a writ of prohibition directed to the court itself. He is not seeking an injunction to vindicate his exclusive control over a *res* in his possession, or in the possession, actual or constructive, of the court that

appointed him. . . . What he seeks is an injunction directed to a suitor, and not to any court, upon the ground that the suitor is misusing a jurisdiction which by hypothesis exists, and converting it by such misuse into an instrument of wrong. . . . We are unable to yield assent to the statement of the court below that 'the restraint of a proper party is legally tantamount to the restraint of the court itself.' The reality of the distinction has illustration in a host of cases."

The above quotation and other authorities herein cited show that the right to enjoin further proceedings interfering with jurisdiction is not limited to proceedings *in rem*.

It was not only within the power of the Pennsylvania Court to issue an injunction, it was its duty to do so. This is because it was not only called upon to protect its own jurisdiction so that the possibility of conflict between courts might be avoided, but it was asked to save a litigant from the peril of concurrent decrees of independent courts on the same subject matter. The obligation, as well as the right, to issue an injunction was held to exist in *Iron Mountain R. Co. v. Memphis*, 96 Fed. 113 (C. C. A., 6th Circ., 1899, opinion by Judge Taft). Here a federal circuit court had granted an injunction to prevent the city from enforcing against the railroad company an ordinance relating to the occupancy of streets. The city countered by an action of ejectment in the state courts, whereupon the railroad, by supplemental bill in the federal circuit court, sought an injunction against the prosecution of the state court actions. The injunction was refused, but this action was reversed on appeal, Judge Taft ruling (pp. 131-132):

". . . inasmuch as the suit had been brought a considerable time before the state suits were

> brought, it justified and required the court below to enjoin the suits in the state court as an impairment of its jurisdiction over the controversy with which it had been invested by the filing of the bill . . . the court below should have permitted the filing of the supplementary bill, and should have granted the injunction to restrain the suits in the state court." (Emphasis added.)

The principle of the foregoing cases has been successfully invoked by the Tennessee Valley Authority to prevent religitation, in the District Court of the United States for the Middle District of Tennessee, of questions allegedly ruled by an earlier suit against the Tennessee Valley Authority in the District Court of the United States for the Northern District of Georgia: *Georgia Power Co. v. Tennessee Valley Authority,* 17 F. Supp. 769 (N. D. Ga., 1937, opinion by Judge Underwood). After the Georgia Court had refused a temporary injunction, the plaintiff and 18 others filed a substantially similar suit in Tennessee, whereupon the Tennessee Valley Authority filed a petition in the Georgia proceeding asking that the Georgia Power Company be restrained from participating in the Tennessee suit. The Georgia Court issued such an injunction, ruling (pp. 770-771):

> "It is not only the right but the duty of this court to protect its jurisdiction and to effectuate its orders and decrees. 'The use of the writ of injunction, by federal courts first acquiring jurisdiction over the parties or the subject-matter of a suit, for the purpose of protecting and preserving the jurisdiction until the object of the suit is accomplished and complete justice done between the parties is familiar and long established practice.' Looney v. Eastern Texas R. R. Co., 247 U. S. 214, 221 . . . .

"Furthermore, 'The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance, in order to avoid the relitigation of questions once settled between the same parties is well settled.' Root v. Woolworth, 150 U. S. 401, 411, 412, 14 S. Ct. 136, 139, 37 L. Ed. 1123. See, also, Continental Illinois Nat. Bank & Trust Co. v. Chicago, Rock Island & P. Ry. Co., 294 U. S. 648, 675, 676, 55 S. Ct. 595, 79 L. Ed. 1110." (Emphasis added.)

This ruling was affirmed, 89 F. (2d) 218 (C. C. A. 5th Circ., 1937, opinion by Judge Foster), the court ruling (p. 221):

"Rarely has a conflict arisen between two federal courts in a civil case. With regard to conflicts between state and federal courts, which occur frequently, the rule is so well settled as to be considered elementary. There is no logical reason why it should differ as to Federal Courts. Compare In re Johnson, 167 U. S. 120, 17 S. Ct. 735, 42 L. Ed. 103. In Harkrader v. Wadley, 172 U. S. 148-163, 19 S. Ct. 119, 125, 43 L. Ed. 399, it was said: '. . . When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases.'

"We consider the just stated rule applies with equal force in conflicts between federal courts in civil cases where the jurisdiction is concurrent. While the federal courts in Georgia and Tennessee had concurrent jurisdiction over the parties and the subject matter of the suit, it is beyond dispute that

> the jurisdiction of the federal court in Georgia first attached. We find no abuse of discretion in the refusal of that court to permit plaintiff to dismiss the suit. **It necessarily follows that that court, having prior jurisdiction of the cause, as between plaintiff and defendant, was authorized to issue an interlocutory injunction to preserve its jurisdiction."** (Emphasis added.)

A writ of certiorari was refused by this Court on October 11, 1937.

The equity in favor of enjoining the law officers of the United States in the case before us is much stronger than it was in favor of enjoining the Alabama Power Company in the TVA case. In the TVA case the Alabama Power Company had been denied a preliminary injunction in the Georgia court and on the basis of that preliminary ruling was restrained from seeking an injunction elsewhere. In the case at hand the Pennsylvania suit has proceeded to a final decree on the merits and the injunction is sought to prevent a reopening of the matters governed by that decree in another court of concurrent and independent jurisdiction.

The TVA still more recently has secured another injunction in the District Court of the United States for the Northern District of Alabama, entered pursuant to the prayers of an ancillary bill filed, after the return of the mandate, in the case of *Ashwander et al. v. Tennessee Valley Authority et al.*, 297 U. S. 288 (1936, opinion by Mr. Chief Justice Hughes). Upon receipt of the mandate of this Court the District Court for the Northern District of Alabama entered a final decree on March 19, 1936, from which no appeal was taken. On May 29, 1936, the Alabama Power Company, together with eighteen other utilities, filed a bill for an injunction in the Chancery Court of Knox County, Tennessee,

which was later removed to the District Court of the United States for the Eastern District of Tennessee, Northern Division, and styled "The Tennessee Electric Power Company et al. v. Tennessee Valley Authority et al." On April 1, 1937, the ancillary bill above mentioned was filed by the Tennessee Valley Authority in the *Ashwander* case in the Northern District of Alabama, seeking to enjoin the Alabama Power Company from further participation in the Tennessee case. An injunction was granted on April 15, 1937, supported by an opinion of District Judge Davis. The case is now on appeal in the United States Circuit Court of Appeals for the Fifth Circuit at its No. 8469.

A recent case in which the authorities are well reviewed in *Trees v. Glenn,* 319 Pa. 485, 181 Atl. 447 (1935, opinion by Mr. Justice Schaffer). The court stated, 319 Pa. at pages 490-491:

> "Appellant's counsel argue that equity will refuse to enjoin a party from proceeding in equity. They are mistaken in this. Under certain conditions an equity court will issue its process to restrain a litigant from proceeding in another equity tribunal. The general governing principle is thus stated in 14 R. C. L., page 410: 'The theory on which a court of equity acts in enjoining a proceeding in another court of coordinate jurisdiction is that it has jurisdiction in personam, and that so acting, it has power to require the defendant to do, or to refrain from doing, anything beyond the limits of its territorial jurisdiction, which it might require to be done or omitted within the limits of such territory. In such a case it may restrain a party from prosecuting a subsequent suit in another jurisdiction, whether the objects of the two suits are the same or not, if the effect of the second suit

is to withdraw from the court first acquiring jurisdiction a part of the subject-matter of the first suit. When an injunction is granted for this purpose, it is in no just sense a prohibition to those courts in the exercise of their jurisdiction. It is not addressed to them and does not even assume to interfere with them. The process is directed only to the parties. It neither assumes any superiority over the court in which the proceedings are had, nor denies its jurisdiction.'" (Emphasis added.)

The Government, in the Court below, attempted to whittle down this long-established practice by taking the position that such cases apply only where the second court is asked to reverse the first court, but not to cases where the second court is asked to supplement or amplify the decree of the first court.

The answers to this contention are many. In the first place the authorities do not support it. There was no such showing made or attempted before the injunction was granted in *Steelman, Trustee v. All Continent Corp., supra,* 301 U. S. 278, and indeed there was no reason to believe that in that case both courts would not decide the matter in exactly the same way, for neither court had passed upon the merits of the controversy. There was no such showing in *Looney v. Eastern Texas R. R. Co., supra,* 247 U. S. 214, or in *Georgia Power Co. v. Tennessee Valley Authority, supra,* 89 F. (2d) 218, for in these cases the first court had merely denied a temporary injunction without passing in any way upon the propriety of a permanent injunction. To the best of our knowledge **no court has ever predicated its injunction on the narrow circumstance that the second court is asked, in the first instance, to reverse what the first court has done.**

Furthermore, it is a matter of common knowledge that cases are not necessarily decided in accordance with the prayers of a plaintiff's bill, and once the jurisdiction of two courts has attached to the same subject matter, it is not only possible but probable that in the course of extended litigation or resulting regulation the courts will take contrary positions on the same matters. Conflicts between Circuit Courts of Appeals on matters of law are common. How much more inevitable would be conflicts between two courts on issues of fact and the interpretation of facts incident to continuing regulation by Court decree. It is the necessity for preventing this possibility of conflict between courts, quite as much as anything else, that has motivated the decisions heretofore cited, *supra,* pp. 35-44.

Nor is it sufficient answer to assert, as did the Government in the Court below, that the Aluminum Company's only remedy is by a plea in bar in the New York suit. A defendant cannot be compelled to proceed on the assumption that the second court will protect him. A litigant is entitled to protection from the peril, however remote, of repeated or conflicting adjudications of the same question between the same parties. It should also be remembered that it is the right and duty of the Pennsylvania Court to protect its jurisdiction, voluntarily invoked by the Government.

III.

The Law Officers of the United States were Properly before the Pennsylvania Court.

1. THE LAW OFFICERS OF THE UNITED STATES WERE SUBJECT TO THE ORDERS OF THE PENNSYLVANIA COURT REGARDLESS OF WHETHER THEY HAD BEEN JOINED AS DEFENDANTS OR WHERE THEY WERE SERVED WITH NOTICE.

The law officers of the United States were brought before the Pennsylvania Court "in their official capacities", as may be seen from paragraph 2 of the order of the Pennsylvania Court entered on April 29, 1937 (R. 135). In such official capacities they are the law officers for the United States, which **voluntarily submitted itself to the jurisdiction of the Pennsylvania Court** when it filed its petition against the Aluminum Company of America and obtained the decree of 1912. The Government was represented at that time by the then Attorney General, George W. Wickersham, two of his assistants and the United States Attorney for the Western District of Pennsylvania, all of whom signed the Government's Pennsylvania petition (R. 36). Their successors in office are in privity with them* and were therefore subject to the jurisdiction and orders of the Pennsylvania Court by the voluntary act of their predecessors in office. Otherwise, a litigant might escape the jurisdiction of a court by the simple expedient of changing attorneys. **They could have been brought before the Pennsylvania Court by simple notice because they were already subject to the orders of the Court in the Pennsylvania suit.** But more was done, for a subpoena

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* *New Orleans v. Citizens' Bank*, 167 U. S. 371, 388-389 (1897, opinion by Mr. Justice White); *Gunter v. Atlantic Coast Line R. R. Co.*, 200 U. S. 273, 283-289 (1906, opinion by Mr. Justice White); 1 *Freeman on Judgments*, § 502:—"Successor and predecessor, in relation to offices, are considered to be in privity with each other, like heir and ancestor."

and a copy of the petition were formally served by the Marshal for the Western District of Pennsylvania upon the United States District Attorney for that District, who is the local representative of the Attorney General in the institution of proceedings in equity under the Sherman Anti-Trust Act, Section 4, quoted hereinafter in Appendix A at page 62. Additional service was effected upon the other law officers by service in their respective districts by the marshals thereof. This was more than sufficient. The law to this effect is old and well established. It was ruled in *Logan v. Patrick,* 5 Cranch 288, (1809, opinion Per Curiam), quoting from the syllabus:

> "The circuit court has jurisdiction, in a suit in equity, to stay proceedings upon a judgment at law between the same parties, although the *subpoena* be served upon the defendant out of the district in which the court sits."

The theory of this line of authority is that the bill to enjoin is an ancillary proceeding and that, therefore, the court has jurisdiction of the subject matter and the parties without reference to the usual requirements of jurisdiction or service. This was ruled in *Freeman v. Howe,* 24 How. 450, 460 (1861, opinion by Mr. Justice Nelson), where it was said:

> "The principle is, that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties."

The Cortes Co. v. Thannhauser, 9 Fed. 226 (C. C. S. D. N. Y., 1881, opinion by Judge Blatchford), is a leading case. That case involved service in and jurisdiction of an action in equity to restrain an action at law, and the court said in that case, at pages 227-228 (and it would be true *a fortiori* in this case):

> "It is a well-settled principle that a bill filed on the equity side of a court, to restrain or regulate a judgment or a suit at law in the same court, is not an original suit, but ancillary and dependent, and supplementary merely to the original suit; and that such a bill can be maintained in a federal court without reference to the citizenship or the residence of the parties. Logan v. Patrick, 5 Cranch, 288; Dunn v. Clarke, 8 Pet. 1; Clarke v. Mathewson, 12 Pet. 164; Freeman v. Howe, 24 How. 450, 460. On this principle the equity suit, not being an original suit, the process or notice issued on its being brought, to advise the plaintiff in the suit at law that it has been brought, is not regarded as original process or as an original proceeding. **Such plaintiff is in court, voluntarily, for the purpose of prosecuting his suit at law and obtaining a judgment, and thereby makes himself subject to any control the court may find it equitable to exercise over his suit at law and over the matters involved in it, to the extent of perpetually staying its prosecution, if, on equitable considerations, that ought to be done. All that is requisite is that the plaintiff in the suit at law should have notice from the court of the institution of the proceeding in equity. . . .** He is in court, for the purposes of the action of the court on the subject-matter of the proceeding in equity, by having become the plaintiff in the suit at law. He is represented, for the purpose of giving notice to him of the institution of such proceedings,

by his chosen attorney in the suit at law." (Emphasis added.)

O'Connor v. O'Connor, 146 Fed. 994, 996-997 (C. C. W. D. Tex., 1906, opinion by Judge Maxey), is another such case.

The right and duty of a court to treat parties before it in an original proceeding as still subject to its jurisdiction for purposes of a supplemental proceeding is even plainer in the case at bar, because the supplemental proceeding is a part of the very equity action which the United States instituted.

The 1937 injunction petition in the Pennsylvania suit was necessarily a supplemental or ancillary proceeding in the existing litigation. Unless this is correct, it was not a proceeding **"wherein the United States is complainant"** (which is a requisite under the terms of the Expediting Act, quoted *infra,* pp. 63-65), and there is therefore no basis for treating it as expedited under that Act and thereby transferring the final injunction hearing from Judge Gibson to the available Circuit Judges. The Attorney General necessarily treated the petition as ancillary to his Expediting Certificate (R. 157).

Furthermore, the Attorney General was correct in so doing, for the reason pointed out in 1 *Cyclopedia of Federal Procedure,* Section 121, where the situation is summarized as follows:

> **"Ancillary or auxiliary federal jurisdiction may be defined as that by which a federal court aids or completes the jurisdiction which it or another federal court has already obtained in the same or another and principal suit."** (Emphasis added.)

The author continues:

> "Technically therefore it is not jurisdiction of the case or controversy, which already exists, but remedial power and the measure of it, which power is exerted by means of an ancillary suit or proceeding. But while it is remedial power rather than jurisdiction of a case or controversy, yet the existence of ancillary power potentially is not dependent on the amenability of the parties to service of process."

Section 122:

> ". . . The rule that service of process or a notice is necessary to the exercise of jurisdiction, and that without it the resultant judgment is a nullity, speaks of the exercise of original jurisdiction and **has no application to the decision of a collateral question in a case where the parties are before the court.**" (Emphasis added.)

The matter is further developed in 3 *Cyclopedia of Federal Procedure,* Section 750, where the law is summarized as follows:

> "If the ancillary bill be for an injunction, it is not requisite that any subpoena or process be served on the defendants to such bill, plaintiffs to the main action, as a preliminary to the issuance of a temporary injunction.
>
> . . . . . .
>
> **"The service of such a notice is not limited to the district in which the ancillary suit pends,** but may be made outside of the district, preferably on the party or parties, it would seem, but by substitution on their attorney of record in the main suit. The court may order personal service on the party, in addition to substituted service on his attorney."

2. THE LAW OFFICERS OF THE UNITED STATES WERE MADE PARTIES DEFENDANT IN THE PENNSYLVANIA SUIT.

The law officers of the United States who are conducting the New York suit were already amenable to this Court's jurisdiction without formally being added as parties. Out of an abundance of caution, because of the importance of this case to the very life of the Aluminum Company, it petitioned that the present Attorney General and his assistants, in their official capacities, be formally added as parties (R. 90-91). This was ordered on April 29, 1937 (R. 135). The parties were added as *defendants* because of Equity Rule 37, hereinafter quoted in Appendix B at page 63. Authority for the order is found in Section 5 of the Sherman Anti-Trust Act, hereinafter quoted at page 62. The Expediting Court vacated the order (R. 185, 186) without explanation. It is submitted that if ever there was a case in which "the ends of justice" required that additional parties be brought before a tribunal it is this proceeding, where law officers of the United States were engaged in defeating the jurisdiction of a court voluntarily invoked by their predecessors in office.

Service was had upon the added parties (R. 150) at their respective offices in Washington, D. C., and New York City. Such extra-territorial service is authorized by Section 5 of the Sherman Act, *infra*, p. 62.

Service was also had upon the District Attorney for the Western District of Pennsylvania; as the docket entries show (R. 2, 4), and this without more would have been a sufficient service upon the Attorney General and his staff, because by the terms of Section 4 of the Sherman Anti-Trust Act the District Attorney is specifically made the agent of the Attorney General in the

prosecution of anti-trust actions in equity (quoted *infra*, p. 62).

3. THE UNITED STATES WAIVED ANY RIGHT TO CHALLENGE SERVICE OF PROCESS UPON ITS OFFICERS BY INVOKING THE EXPEDITING COURT.

If there were any doubt as to the jurisdiction of the Pennsylvania Court over the person of these particular law officers of the United States (which there is not), it is removed by the action of the Attorney General in bringing about the creation of a statutory Expediting District Court by filing an Expediting Certificate. True, he attempted (R. 159) to stand on a special appearance in so doing but it need hardly be argued that one cannot maintain a special appearance or deny the jurisdiction of a court over his person when that party by his own act has brought about the creation of a special court to hear his case. It has been quite universally ruled in comparable cases that such a move constitutes a waiver of the special appearance: cf. *Kelly v. Brown*, 310 Ill. 319, 141 N. E. 743 (1923, opinion by Mr. Chief Justice Farmer); *State ex rel. Engle v. Hilgendorf*, 136 Wis. 21, 116 N. W. 848 (1908, opinion by Mr. Justice Bashford).

We respectfully submit that the Attorney General and the other law officers of the United States should not be permitted to have their cake and eat it. They should not be permitted to speculate on the result of the final hearing before the Expediting Court, prepared to accept a favorable decree but in a position to resist the jurisdiction of the Court to make an unfavorable decree.

4. THIS APPLICATION FOR AN INJUNCTION IS NOT A SUIT AGAINST THE UNITED STATES, BUT IF IT WERE SUCH, THE PENNSYLVANIA COURT WOULD HAVE JURISDICTION TO ENTERTAIN IT AS AN ANCILLARY PROCEEDING IN THE PENNSYLVANIA SUIT.

A. The authority to enjoin a public official from the enforcement of an unconstitutional statute is well settled: *Ex parte Young*, 209 U. S. 123, 155-161 (1908, opinion by Mr. Justice Peckham). Likewise, the authority to enjoin a public official from performing an act beyond the scope of his authority, although not unconstitutional, is clear: *Santa Fe Pacific R. R. Co. v. Lane (Secretary of Interior)*, 244 U. S. 492 (1917, opinion by Mr. Justice Van Devanter); *Noble (Secretary of Interior) v. Union River Logging R. R. Co.*, 147 U. S. 165, 170-172 (1893, opinion by Mr. Justice Brown). On a parity of reasoning, a public official may be restrained from relitigating in a second forum issues pending or adjudicated in another forum: *Looney (Attorney General of Texas) v. Eastern Texas R. R. Co., supra*, 247 U. S. 214, 219-220; *Gunter (Attorney General of South Carolina) v. Atlantic Coast Line R. R. Co.*, 200 U. S. 273, 292 (1906, opinion by Mr. Justice White). The reasoning of the foregoing decisions is that the public official is acting beyond the scope of his proper authority and is therefore not to be regarded as cloaked with the immunity which might otherwise surround the sovereignty represented by him.

B. Conclusive as the foregoing authorities are believed to be, the Aluminum Company need not rely upon them, because if the present ancillary action is held to be one against the United States rather than its agents, the United States is properly a party to the ancillary action because it voluntarily invoked the juris-

diction of the court in filing the Pennsylvania suit. Being in court as a litigant, it, like any other party, must acquiesce in the complete jurisdiction of the Pennsylvania Court.

In *United States v. The Thekla*, 266 U. S. 328 (1924, opinion by Mr. Justice Holmes), the United States joined as libellant in an admiralty action and attempted to do so "without submitting itself to the jurisdiction" of the court (p. 338) but a decree was entered against it on a cross-libel for $120,619.71 with interest and costs. Sustaining the decree on appeal, this Court said (pp. 339-340):

> "We . . . are of opinion that the District Court had power to enter a decree for damages. When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter."

Further (p. 341):

> "It is said that there is no statute by which the Government accepted this liability. **It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act.**" (Emphasis added.)

In *People of Porto Rico v. Ramos*, 232 U. S. 627, 632 (1914, opinion by Mr. Justice McKenna), this Court ruled:

> ". . . . the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step."

To the same effect are *The Siren,* 7 Wall. 152 (1869, opinion by Mr. Justice Field), and *Carr v. United States,* 98 U. S. 433 (1878, opinion by Mr. Justice Bradley).

We do not challenge the immunity of the United States from suit without its consent. It stands on the same high ground as, but no higher than, the immunity conferred upon states of the United States by the Eleventh Amendment, adopted in 1798 and providing as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

It was said in *Jacob Hoffmann Brewing Co. v. McElligott,* 259 Fed. 525, 527 (C. C. A., 2d Circ., 1919, opinion by Judge Ward):

> "There is no difference between the states and the United States in respect to this immunity from suit. It is an attribute of every sovereign, recognized by all sovereigns."

It is true that an independent suit cannot be maintained against the United States without its consent, but it is equally true that where the United States voluntarily submits to the jurisdiction of judicial tribunals by asking relief, it subjects itself to equitable proceedings of a summary character with reference thereto.

The authorities are decisive against a claim of immunity by a sovereign after it has voluntarily become a litigant in the very tribunal in which it asserts the immunity. For example, in *Gunter* (*Attorney General of South Carolina*) *v. Atlantic Coast Line R. R. Co., supra,* 200 U. S. 273, 292, this Court said of the attempt to

assert immunity from suit on behalf of the State of South Carolina (which, under the Eleventh Amendment, stands in exactly the same position as the United States):

> "Both the statute and the amendment* relate to the power of courts of the United States to deal, against the will and consent of a State, with controversies between it and individuals. None of the prohibitions, therefore, of the Amendment or of the statute relate to the power of a federal court to administer relief in causes where jurisdiction as to a State and its officers has been acquired as a result of the voluntary action of the State in submitting its rights to judicial determination. To confound the two classes of cases is but to overlook the distinction which exists between the power of a court to deal with a subject over which it has jurisdiction and its want of authority to entertain a controversy as to which jurisdiction is not possessed."

Port Royal & Augusta Ry. Co. v. South Carolina, 60 Fed. 552 (C. C. D. S. C., 1894, opinion by Judge Simonton) was similar. There the State of South Carolina brought a bill against a railroad and the bill was removed to the United States Circuit Court and a cross bill filed by the railroad against the sovereign state of South Carolina. "Subpoenas were issued, and the State of South Carolina was served by substituted service on the attorney general, by whom the original bill was filed. A motion [was] made to set aside the service of the subpoena, and dismiss the cross bill, upon the ground that it [would] not lie against a sov-

*These references are to the Eleventh Amendment and Section 720 of the Revised Statutes (28 U. S. C. A. § 379).

ereign state" (p. 552). The motion was overruled, the court holding (p. 553):

> "A sovereign state cannot be forced into court against her consent; but a cross bill presupposes that the plaintiff is already in court rightfully, and when the state comes into court of her own accord, and invokes its aid, **'she is, of course, bound by all the rules established for the administration of justice between individuals.'** State v. Pacific Guano Co., 22 S. C. 74. . . . The only question now before us is, can the state be called to make defense to a cross bill filed in a suit instituted by herself? As by her own volition she is already in court, and as the cross bill is **but a part** of the defense to her suit, ancillary to and dependent upon it, we hold that **she has by her own act subjected herself to all the rules established for the administration of justice between individuals, and must make her defense to this cross bill."** (Emphasis added.)

Other rulings to the same effect are *United States v. American Surety Co.,* 110 Fed. 913 (C. C. D. Me. 1901, opinion by Judge Putnam), and *Fish v. Morgenthau,* 10 F. Supp. 613 (D. N. H., 1935, opinion by Judge Morris).

The principle to which we have referred as to the effect of participation by the United States in a suit in court is nowhere controverted so far as we have been able to learn. Any cases heretofore cited by Government counsel to the effect that the United States cannot be sued without its consent have been found to be (1) independent suits, (2) ancillary action in litigation to which the Government had not theretofore been a party or (3) suits extending the scope of the litigation beyond the subject matter brought into court by the United States.

IV.

Conclusion.

We respectfully submit that the following propositions are well settled, upon principle and authority:

(1) When the United States files a bill in equity claiming that a corporation has violated the Sherman Act and upon that bill obtains a decree, regulating the corporation's future activities on the premise that the corporation is a monopoly, any further equitable relief, involving the same subject matter, can only be obtained by supplementary application in the very suit in which the decree has already been entered.

(2) The court in which the decree has been entered has full and complete authority to modify the decree in every way that may be required and to grant any further appropriate relief. It has this power "by force of principles inherent in the jurisdiction of the chancery," whether or not the decree originally entered specifically retains jurisdiction of the suit.

(3) Any number of additional parties can be brought into the original suit upon the supplementary proceedings, Section 5 of the Sherman Act expressly providing that where "the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not . . ." Thus every additional defendant named in the New York suit can be brought into the Pennsylvania Court by the United States and service may be made in any district of the United States for that purpose.

(4) When the United States by its law officers files a bill in equity and obtains an injunction operating

for the future, those law officers and their successors in their official capacities are in that court and subject to its complete control so long as the injunction operates. Unquestionably they are subject to the injunction of the Pennsylvania Court without being made parties to the suit.

(5) When the law officers of the United States are ignoring the jurisdiction of the court whose jurisdiction their official predecessors invoked, clearly the Sherman Act authorizes the court to join them as parties if "the ends of justice require" and clearly the court may enjoin them from defeating its jurisdiction.

The New York litigation marks a radical departure. Prior thereto it had been the practice of the Department of Justice to relitigate anti-trust questions settled by existing decrees by returning to the court which had entered the original decree and there securing an adjudication or amendment of that decree in the light of the current facts: *United States v. International Harvester Co., supra,* 274 U. S. 693; *United States v. Standard Oil Co. of New Jersey, supra,* 47 F. (2d) 288.

Now all is changed. The court of first jurisdiction is ignored and the reliance of the private litigant upon the terms of the first decree is attempted to be set at naught by a new petition in which it is proposed to proceed as though there had been no prior adjudication and as though there were no outstanding injunction. The ruling of this Court that a decree is only to be changed upon a showing of changed conditions (*United States v. Swift & Co., supra,* 286 U. S. 106, 114-115) is to be set at naught by going to a court where there is no existing decree.

It is not fair to either the Pennsylvania or the New York Court to have the identical question litigated in both forums. It is the kind of thing which the Government condemns when its ox is gored. Witness, for example, the printed brief on behalf of the Tennessee Valley Authority at pp. 30-31 in the case of *Georgia Power Co. v. Tennessee Valley Authority* in the United States Circuit Court of Appeals for the Fifth Circuit (89 F. (2d) 218), where attorneys for the United States, on February 27, 1937, advised the court:

> "'It is gross oppression to vex another with a double suit for the same cause of action' (Putnam v. Clark, 34 N. J. Eq. 532)."
>
> "'It is *prima facie* vexatious to bring two actions where one will do' (The Christiansborg, L. R. (1885), 10 Prob. Div. 146)."
>
> "A party is bound 'by a regard for propriety, if no other law, not to seek to wrest the litigation from the court in which it had been commenced' (Conover v. The Mayor &c of New York, supra, at 525)".

It was not the Aluminum Company's decision that brought the Pennsylvania suit into being. It was not the Aluminum Company's choice that it be sued again in New York for the same offenses regulated by the 1912 decree. It was not the Aluminum Company that brought about the creation of a statutory Expediting Court to pass upon all future aspects of the Pennsylvania suit. All of these decisions we pass without comment, for they are beyond our control and are decisions the authority and responsibility for which are clearly vested in the Department of Justice.

We do not seek to choose the forum in which the legality of the Aluminum Company's conduct shall be

decided. We simply contend that, one forum having been chosen and the issue still being before that tribunal, the Government may not be permitted a second forum in which to try the same issue. This we do earnestly protest, to the end that if the issues which were made the subject of the Pennsylvania decree are to be relitigated, they should be tried before the Government invoked statutory Expediting District Court of the United States for the Western District of Pennsylvania. Then, when all is said and done and the Aluminum Company is either ordered dissolved, or enjoined, or both, or neither, there will be outstanding not two decrees, but one, so that the arbiter of the company's destiny may not be two courts of independent jurisdiction but one court, charged with the sole responsibility of sitting in judgment upon the future of this company.

Respectfully submitted,

WILLIAM WATSON SMITH,
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APPENDIX.

A.

Sections 4 and 5 of the Sherman Anti-Trust Act of July 2, 1890, c. 647, §§ 4, 5, 26 Stat. 209-210 (15 U. S. C. A. §§ 4, 5).

§ 4. "The several circuit courts [district courts] of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

§ 5. "Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof." (Matter in brackets comprises amendment supplied by the Judicial Code, Act of March 3, 1911, c. 231, § 291, 36 Stat. 1167.)

B

Federal Equity Rule 37.

Parties Generally—Intervention.

". . . Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant. . . ."

C

The Expediting Act of February 11, 1903, c. 544, 32 Stat. 823, as amended by the Act of June 25, 1910, c. 428, 36 Stat. 854 (15 U. S. C. A. §§ 28-29).

"Be It Enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That in any suit in equity pending or hereafter brought in any circuit court [district court] of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney-General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day,

before not less than three of the circuit judges of said circuit, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select; or, in case the full court shall not at any time be made up by reason of the necessary absence or disqualification of one or more of the said circuit judges, the justice of the Supreme Court assigned to that circuit or the other circuit judge or judges may designate a district judge or judges within the circuit who shall be competent to sit in said court at the hearing of said suit. In the event the judges sitting in such case shall be equally divided in opinion as to the decision or disposition of said cause, or in the event that a majority of said judges shall be unable to agree upon the judgment, order, or decree finally disposing of said case in said court which should be entered in said cause, then they shall immediately certify that fact to the Chief Justice of the United States, who shall at once designate and appoint some circuit judge to sit with said judges and to assist in determining said cause. Such order of the Chief Justice shall be immediately transmitted to the clerk of the circuit court [district court] in which said cause is pending, and shall be entered upon the minutes of said court. Thereupon said cause shall at once be set down for reargument and the parties thereto notified in writing by the clerk of said court of the action of the court and the date fixed for the reargument thereof. The provisions of this section shall apply to all causes and proceedings in all courts now pending, or which may hereafter be brought.

2. That in every suit in equity pending or hereafter brought in any circuit court [district court] of the United States under any of said Acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the

circuit court [district court] will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided,* That in any case where an appeal may have been taken from the final decree of a circuit court to the circuit court of appeals before this Act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law." (Matter in brackets comprises amendment supplied by the Judicial Code, Act of March 3, 1911, c. 231, § 291, 36 Stat. 1167.)

D

Excerpts from the Decree of the District Court of the United States for the Western District of Pennsylvania entered June 7, 1912, in the case at bar.

"1. That sections 2, 4, and 5 of the agreement entered into as of date September 25, 1908, between the Societe Anonyme pour l'Industrie de l'Aluminum of Neuhausen and the Northern Aluminum Company (Ltd.), acting on behalf of the defendant corporation, as follows, to wit:

(Certain portions of the contract are thereupon paraphrased.)

be and the same are hereby declared null and void, and that the defendant Aluminum Company of America, and all its agents and representatives in whatever capacity, are hereby perpetually enjoined from directly or indirectly requiring the parties to said contract to abide by its terms, and defendant is further enjoined from either directly or indirectly entering into, through said Northern Aluminum Company, or any other person or corporation, and from making or aiding in making any agreement containing provisions of the nature of those

hereinbefore set out, in so far as they relate to the sale of aluminum in the United States, or its importation into or exportation from the United States, or any contract or agreement, either verbal or written, the purpose and effect of which would be to restrain the importation into the United States, from any part of the world, of aluminum, or alumina, or bauxite, or any other material from which aluminum can be manufactured, or to fix or illegally affect the prices of such aluminum, alumina, bauxite, or other material, when imported." (R. 64-65; Emphasis added.)

"6. . . That the defendant and its officers, agents, and representatives be and they are hereby perpetually enjoined from entering into a contract with any other individual, firm, or corporation of a like or similar character to the above-quoted provisions in the contracts between the Aluminum Company of America and the General Chemical Company, between said Aluminum Company and the Norton Company, between said Aluminum Company and the Pennsylvania Salt Manufacturing Company, and between said Aluminum Company and Kruttschnitt and Coleman, or either of them, and from entering into or participating in any combination or agreement the purpose or effect of which is to restrict or control the output or the prices of aluminum or any material from which aluminum is directly or indirectly manufactured, and from making any contract* or agree-

* It should be noticed that paragraph 6 of the decree enjoins any "combination", "agreement" or "contract" which has the purpose or effect prohibited by this portion of the decree. The quoted words are the equivalent of the words "contract, combination * * * or conspiracy" in Section 1 of the Sherman Act (a conspiracy involving, by necessary definition, a *combination* of two or more persons: *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271—C. C. A., 6th Circ., 1898, opinion by Judge Taft), which have been described as an "all-embracing enumeration to make sure that no form of contract or combination by which an

ment for the purpose of or the effect of which would be to restrain commerce in bauxite, alumina, or aluminum, or to prevent any other person, firm or corporation from or to hinder him or it in obtaining a supply of either bauxite, alumina or aluminum of a good quality in the open market in free and fair and open competition, and from themselves entering into, or compelling or inducing under any pretext, or in any manner whatsoever, the making of any contract between any persons, firms, or corporations engaged in any branch of the business of manufacturing aluminum goods, the purpose or effect of which would be to fix or regulate the prices of any of their raw or manufactured products in sale or resale". (R. 69; emphasis added.)

"7. To prevent all undue discrimination upon the part of defendant and its officers and agents, or upon the part of any firm or corporation in whose business defendant owns or hereafter acquires a financial interest by stock ownership or otherwise, against any competitor of defendant, and thus to prevent the unlawful acquisition by defendant of a monopoly in any branch of manufacturing from crude or semifinished aluminum, defendant and its officers, agents, and representatives, are hereby perpetually enjoined from committing the following acts, to wit:

"(*a*) Combining either by stock ownership or otherwise with any one or more manufacturers for the

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undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation." (*Standard Oil Co. v. United States*, 221 U. S. 1, 59-60—1911, opinion by Mr. Chief Justice White). It was said of the Sherman Act words in *Northern Securities Co. v. United States*, 193 U. S. 197, 331 (1904, opinion by Mr. Justice Harlan), that they applied to "every contract, combination or conspiracy in whatever form, of whatever nature, and whoever may be parties to it."

purpose or with the effect of controlling or restraining the output of any product manufactured from aluminum, or fixing or controlling the price thereof.

"(*b*) Delaying shipments of material to any competitor without reasonable notice and cause, or refusing to ship or ceasing to continue shipments of crude or semifinished aluminum to a competitor on contracts or orders placed, and particularly on partially filled orders, without any reasonable cause and without giving notice of same, or purposely delaying bills of lading on material shipped to any competitor, or in any other manner making it impossible or difficult for such competitor promptly to obtain the material upon its arrival, or from furnishing known defective material.

"(*c*) Charging higher prices for crude or semi-finished aluminum from any competitor than are charged at the same time under like or similar conditions from any of the companies in which defendant is financially interested, or charging or demanding higher prices for any kind of crude or semi-finished aluminum from any competitor for the purpose or which under like or similar conditions will have the effect of discriminating against such manufacturers in bidding on proposals or contracts to the advantage of said defendant or any company in which it is financially interested.

"(*d*) Refusing to sell crude or semifinished aluminum to prospective competitors in any branch of the manufacturing aluminum goods industry on like terms and conditions of sale, under like or similar circumstances, as defendant sells such crude or semifinished aluminum to any firm or corporation engaged in similar business in which defendant is financially interested.

"(*e*) Requiring, as a condition precedent to selling crude or semifinished aluminum to a competitor, that

such competitor divulge to defendant the terms which such competitor proposes to make in order to secure the work in which the desired aluminum is to be used, and from imparting to any one the purpose or purposes for which said competitor is intending to use said metal.

"(*f*) Requiring or compelling the making of agreements by competitors not to engage in any line of business nor to supply any special order in competition with defendant or with any company in which it is financially interested as a condition precedent to the procurement of aluminum metal.

"(*g*) Representing or intimating to competitors that unless they dealt with defendant or with companies in which defendant has a financial interest for their supply of metal such competitor will not be able to obtain a sufficient supply of metal or obtain it at a price that will permit them to engage in competition with defendant or with companies in which defendant is financially interested; or in like manner representing or intimating to consumers of aluminum in any stage of manufacture that unless they deal with defendant or with a company in which it is financially interested, their supply of material or manufactured products will be cut off for that reason.

"(*h*) Taking the position with persons, firms, or corporations engaged in the manufacture of any kind of aluminum goods that if they attempt to enlarge or increase any of their industries or engage in enterprises that are or will be competitive with defendant or with the business of any firm or corporation in which defendant is financially interested such persons, firms, or corporations will for that reason be unable to procure their supply of material from defendant or any of the companies in which it is financially interested." (R. 69-71; emphasis added.)